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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
8

9 Heriberto F Catarino,  
10 Petitioner,

11 v.

12 Charles Ryan, et al.,  
13 Respondents.  
14

No. CV-16-00012-TUC-RM (DTF)

**REPORT AND  
RECOMMENDATION**

15 Petitioner Heriberto F. Catarino (Petitioner), presently incarcerated at the  
16 Arizona State Prison Complex – Eyman Cook Unit, in Florence, Arizona, filed a  
17 Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (Petition).  
18 Pursuant to the Rules of Practice of the Court, this matter was referred to  
19 Magistrate Judge Ferraro for Report and Recommendation. As more fully  
20 explained below, the Magistrate Judge **recommends** that the District Court, after  
21 its independent review of the record, **dismiss** the Petition.

22 **Factual and Procedural Background**

23 The Indictment and Plea

24 On October 17, 2013, a Cochise County grand jury indicted Petitioner on  
25 thirteen counts of sexual conduct with a minor, two counts of domestic violence  
26 assault, one count of domestic violence/aggravated assault, and one count of  
27 domestic violence/criminal damage. (Doc. 17 at Ex. A.) Petitioner was accused of  
28 sexually abusing his 12-year-old stepdaughter on multiple occasions over the

1 course of a year and a half. (Doc. 17 at Ex. H at pp. 4-6.) When Petitioner's wife  
2 discovered the abuse, they engaged in a physical fight and Petitioner tried to choke  
3 her. (*Id.*) A neighbor heard the fight and contacted the police. (*Id.*)

4 On March 4, 2014, Petitioner, represented by appointed counsel, pled guilty  
5 to three counts in exchange for dismissal of the remaining counts against him. (*Id.*  
6 at Ex. G at pp. 24, 39 and Ex. E.) Just before the change-of-plea hearing, the trial  
7 court pointed out an issue with Petitioner pleading guilty to the plea as it was  
8 drafted. (*Id.* at Ex. G at pp. 8-9.) To resolve the issue it was agreed that count 1 of  
9 the plea agreement would be substituted for a different count of the indictment so  
10 that Petitioner would be pleading guilty to a count of the indictment that charged  
11 him with committing acts against a victim who was under 12 years of age<sup>1</sup> (as the  
12 parties' had intended Petitioner to so plead). (*Id.* at p. 11.) A recess was taken in  
13 order to give defense counsel an opportunity to explain the change to Petitioner.  
14 (*Id.* at p. 9.) Before taking the recess, the trial court stated on the record that the  
15 change would

16 not change the agreement at all. The amount of time, the  
17 consequences will be the same. However, count 1 of the plea  
18 agreement will be a different count [of the indictment].

19 (*Id.* at pp. 9-10.)

20 After the recess, the trial court conducted a plea colloquy with Petitioner.  
21 (*Id.* at pp. 11-35.) In response to direct questioning by the trial court Petitioner  
22 represented that he read and understood the agreement, signed the agreement, and  
23 initialed each paragraph of the agreement. (Doc. 17 at Ex. G at pp. 14-16.)  
24 Regarding the changes that had been made to the first page of the plea agreement  
25 and that had been discussed during the recess, Petitioner was specifically examined  
26 by the trial court as to whether he had initialed the changes and Petitioner  
27 represented "Yes." (*Id.* at p. 15.) Petitioner confirmed for the trial court that he

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28 <sup>1</sup> (in violation of A.R.S. § 13-705(B))

1 understood the charges he was pleading guilty to and the sentencing range,  
2 including that he would receive a 27-year sentence for count 1, lifetime probation  
3 for count 2, and a 2.5-year sentence for count 3. (*Id.* at pp. 16-24.) Petitioner also  
4 confirmed to the court that he understood that his 27-year sentence would be a  
5 “calendar year sentence,” and that he “would have to serve that sentence day-for-  
6 day.” (*Id.*) The trial court repeated that Petitioner’s sentence under the plea is a  
7 day-for-day sentence. (*Id.* at p. 17.)

8 The transcript from the change-of-plea hearing reflects that the trial court  
9 read each count of the amended plea agreement and, after each count, asked  
10 Petitioner how he wanted to plead. (*Id.* at pp. 32-33.) Petitioner responded  
11 “Guilty.” (*Id.*) After the factual basis for the plea was presented, the trial court  
12 asked whether either counsel had any concerns about the voluntariness of the plea.  
13 (*Id.* at pp. 34-37.) Hearing no voluntariness concerns, the trial court found that  
14 Petitioner “knowingly, intelligently, and voluntarily offer[ed] his pleas of guilty to  
15 the three crimes set forth in the plea agreement presented to the court on this date.”  
16 (*Id.* at Ex. G at p. 38.) On March 31, 2014, Petitioner was sentenced in accordance  
17 with the sentence agreed to in the plea agreement: 27-years’ imprisonment for  
18 count 1, lifetime probation for count 2, and 2.5-years’ imprisonment for count 3.  
19 (*Id.* at Ex. J; K at pp. 43-47.)

#### 20 Initial PCR Proceedings

21 Petitioner timely commenced his “of-right” post-conviction relief (PCR)  
22 proceeding by filing a notice of PCR. (*Id.* at Ex. M.) His court appointed counsel  
23 filed a notice stating that she was unable to find any colorable claims to raise and  
24 requested additional time for Petitioner to file a *pro se* petition. (Doc. 17 at Ex. O,  
25 P.) Petitioner timely filed a *pro se* petition raising two issues. Petitioner first  
26 argued that he was deprived of his right to present mitigating evidence at  
27 sentencing. His second issue alleged that the trial court breached the plea  
28 agreement by failing to mention any aggravating factors during sentencing that

1 would justify the aggravated sentence (27 years). (*Id.* at Ex. Q.) The trial court  
2 rejected Petitioner’s first issue but agreed with Petitioner on his second issue. (*Id.*  
3 at Ex. R.) The trial court agreed that Petitioner was entitled to a resentencing on  
4 count 1, but determined that there was no need for an evidentiary hearing because  
5 “the facts necessary to decide the issues raised” were already “clearly set forth in  
6 the record.” (*Id.* at p. 2.)

7 Prior to his resentencing, Petitioner filed a motion for reconsideration  
8 arguing that the trial court could not impose an aggravated sentence unless the jury  
9 found aggravating circumstances or he waived his right to require the jury to make  
10 such findings. (*Id.* at Ex. V.) Petitioner also raised three arguments in his motion  
11 for reconsideration: (1) counsel was ineffective for failing to bring the issue to the  
12 court’s attention; (2) counsel was ineffective for causing “the error contained in  
13 count 1 concerning the state omitting A.R.S. § 13-702”; and (3) counsel was  
14 ineffective for permitting the superior court to participate in plea negotiations. (*Id.*  
15 at p. 8.)

16 Petitioner was heard on his motion for reconsideration at his resentencing.  
17 (*Id.* at Ex. X at pp. 4-5.) The trial court rejected his arguments, explaining that he  
18 (Petitioner) had agreed to the 27-year sentence in the plea agreement and the only  
19 error made by the trial court at his original sentencing was its failure to state the  
20 aggravating factors on the record. (*Id.* at pp. 5-6.) The trial court noted that the  
21 emotional harm to the victim had been “clearly and beyond any doubt” established  
22 by the evidence presented at the original sentencing hearing. (*Id.* at pp. 6-7.)  
23 Petitioner’s 27-year sentence was confirmed and his motion for reconsideration  
24 was denied. (Doc. 17 at Ex. W at pp. 1-2.)

#### 25 Petition for Review in the Arizona Court of Appeals

26 After his resentencing, Petitioner timely filed a petition for review in the  
27 Arizona Court of Appeals raising five (5) issues: (1) his sentence was in violation  
28 of the U.S. Constitution and the State of Arizona and “exceeded the maximum

1 authorized by law”; (2) his alleged confession was “attained (*sic*) in violation of  
2 the 6<sup>th</sup> Amendment right to counsel...”; (3) his right to due process was violated  
3 during plea negotiations by “[j]udicial participation”; (4) “[i]neffective assistance  
4 of counsel”; and (5) he was sentenced to multiple counts of sexual conduct with a  
5 minor and “the statute is unconstitutionally ambiguous.” (*Id.* at Ex. Z at p. 2.)

6 The court of appeals granted review but denied relief holding that Petitioner  
7 failed to appeal the issue that he had raised in his PCR petition. (*Id.* at Ex. CC at ¶  
8 5.) The court of appeals determined that the issues raised by Petitioner had not  
9 been raised in a timely manner to the trial court because they were not made in his  
10 PCR petition but, rather, only were raised in his motion for reconsideration relying  
11 upon Ariz. R. Crim. P. 32.9(a) and *State v. Bonnell*, 171 831 P.2d 434, 437 n.3  
12 (App. 1992). (*Id.*) The appeals court held that the trial court did not err in  
13 summarily denying Petitioner’s motion for reconsideration and refused to address  
14 Petitioner’s claims on the merits. (*Id.*) Thereafter, Petitioner filed a motion for  
15 reconsideration which was rejected. (*Id.* at Exs. DD, EE.) Petitioner’s request that  
16 the court of appeals stay the issuance of the mandate was also denied. (*Id.* at Ex.  
17 GG, HH.)

#### 18 Special Action Proceedings

19 While Petitioner’s petition for review in the Arizona Court of Appeals was  
20 pending, Petitioner filed a special action petition with the Arizona Supreme Court  
21 raising five issues stated thusly: (1) “the trial court participated in the plea  
22 agreement”; (2) “the trial court imposed a prison sentence no authorized by law in  
23 violation of the United States and Arizona Constitution”; (3) “the trial court did not  
24 impose sentence according to applicable statutes”; (4) “the prosecutor modified a  
25 signed plea agreement removing first time felony sentencing”; and (5) “the trial  
26 court found an aggravated sentence by a preponderance of the evidence without the  
27 proper required factors.” (Doc. 17 at Ex. JJ at pp. 3-4.) The Arizona Supreme  
28 Court dismissed Petitioner’s special action petition noting his then-pending petition

1 before the Arizona Court of Appeals and determining that there was “an equally  
2 plain, speedy, and adequate remedy by appeal.” (*Id.* at Ex. LL.) The Arizona  
3 Supreme Court directed Petitioner to file a petition for review if the Arizona Court  
4 of Appeals denied review or relief. (*Id.*) Petitioner did not do so. (*Id.* at Ex. UU.)

5 Second Post-Conviction-Relief Proceedings

6 Instead, Petitioner filed a motion seeking to withdraw his plea in the state  
7 trial court arguing that he should be allowed to withdraw his plea because  
8 constitutional error allegedly occurred: (1) “when the State conducted his second  
9 interview counsel”; (2) “when Officer Navarette failed to properly Mirandatize  
10 (*sic*) defendant, saying ‘You can contact a lawyer at anytime (*sic*)’”; and (3)  
11 “ineffective assistance of trial counsel for failing to test the State’s case at all.” (*Id.*  
12 at Ex. MM at ¶ 31.) The trial court construed this motion as a second PCR petition.  
13 (*Id.* at Ex. NN.) In rejecting it, the trial court held,

14 A motion to withdraw a plea of guilty must be made before  
15 sentencing. *State v. Honley*, 108 Ariz. 144, 146, 493 P.2d 1201, 1203  
16 (1972). A defendant who fails to file a rule 17.5 motion to withdraw  
17 from plea before sentencing is limited to post-conviction relief under  
18 Rule 32. *See, State v. Georgeoff*, 163 Ariz. 434, 437, 788 P.2d 1185,  
1188 (1990). ...

19 Defendant claims his attorney was ineffective for failing to challenge  
20 Defendant’s interrogation by a police officer. Defendant participated  
21 in a settlement conference in this case and ultimately entered  
22 knowing, voluntary, and intelligent pleas of guilty. Defendant waived  
23 his right to challenge the police interrogation by his entry of the guilty  
pleas.

24 More importantly, the record clearly establishes a factual basis for  
25 Defendant’s pleas of guilty without even considering his statements to  
26 the police officer. The State could have presented overwhelming  
27 evidence of guilt at trial apart from Defendant’s statements. Defendant  
28 was not prejudiced by the decision to waive any issue regarding the  
interrogation.

1 Defendant's current claims are precluded pursuant to Rule 32.2(a),  
2 Rules of Crim. Proc. In Defendant's previous [PCR petition] he  
3 certified that he was then raising all claims which could be raised. He  
4 further certified his understanding that any other claims of which he  
was then aware could be precluded.

5 (Doc. 17 at Ex. NN at p. 1.) Petitioner then moved for reconsideration which was  
6 denied. (*Id.* at Exs. OO, PP.)

### 7 The Petition

8 Thereafter, on January 7, 2016, Petitioner filed his Petition raising four  
9 grounds for relief. (Doc. 1 at pp. 6-8.) In Ground One Petitioner alleges ineffective  
10 assistance of trial counsel for counsel's alleged failure to question the admissibility  
11 of Petitioner's confession through a motion to suppress. Also in Ground One,  
12 Petitioner alleges trial counsel was ineffective for suggesting that one of the counts  
13 in his plea agreement be changed from a count that would have entitled him to  
14 85% time to a count that required him to serve 100% flat time. In Ground Two  
15 Petitioner alleges his Fifth Amendment right to counsel was violated during his  
16 second police interrogation because the formal adversarial process had already  
17 begun. Finally, in Ground Three, Petitioner alleges his Sixth Amendment right to  
18 counsel during a police interrogation was violated. On March 3, 2016, the district  
19 court ordered the Petition served upon Respondent. (Doc. 9.) On July 14, 2016,  
20 Respondent filed its Limited Answer to Petition for Writ of Habeas Corpus (Doc.  
21 17.) Petitioner did not file a reply. (*See* Dkt.)

22 As more fully set forth below, Petitioner is not entitled to habeas relief. As  
23 such, this Court recommends the District Court dismiss the Petition.

### 24 **The Claims in the Petition are Defaulted**

25 As mentioned above, the Petition raises four grounds for relief. (Doc. 1 at  
26 pp. 6-8.) As explained below, all of the claims raised by Petitioner are procedurally  
27 defaulted without excuse. Additionally, as a result of Petitioner's pleading guilty  
28 review of one of the ineffective assistance of counsel claims contained in Ground

1 One, as well as the claims in Grounds Two and Three, are waived.

2 Exhaustion and Procedural Default

3 *Exhaustion:* The Petition is governed by the Anti-Terrorism and Effective  
4 Death Penalty Act (AEDPA). 28 U.S.C. § 2254. In order to seek federal habeas  
5 relief a state prisoner must allege that he is being held in violation of federal law.  
6 28 U.S.C. § 2254(a). A federal court may not grant habeas relief unless “the  
7 applicant has exhausted the remedies available in the court of the state.” 28 U.S.C.  
8 § 2254(b)(1)(A).

9 This requirement is designed to give state courts a chance “to resolve federal  
10 constitutional claims before those claims are presented to the federal court[.]”  
11 *O’Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). To properly exhaust a claim, a  
12 petitioner must “first raise the claim in a direct appeal or collaterally attack his  
13 conviction in a petition for post-conviction relief pursuant to Rule 32.” *Roettgen v.*  
14 *Copeland*, 33 F.3d 36, 38 (9<sup>th</sup> Cir. 1994). Accordingly, “state prisoners must give  
15 the state courts one full opportunity to resolve any constitutional issues” by fairly  
16 presenting their claims through “one complete round of the State’s established  
17 appellate review process.” *O’Sullivan*, 526 U.S. at 845.

18 With the exception of habeas petitions regarding life-sentences or capital  
19 cases, claims of Arizona state prisoners are exhausted for purposes of federal  
20 habeas relief once the Arizona Court of Appeals has ruled on them. *Castillo v.*  
21 *McFadden*, 399 F.3d 993, 998 n.3 (9<sup>th</sup> Cir. 2005); *Swoopes v. Sublett*, 196 F.3d  
22 1008, 1010 (9<sup>th</sup> Cir. 1999). A petitioner must present “his federal, constitutional  
23 issue before the Arizona Court of Appeals within the four corners of his appellate  
24 briefing.” *Castillo*, 399 F.3d at 1000. (Additional citation omitted.)

25 *Default:* If the prisoner fails to fairly present his claim to the state court in a  
26 procedurally appropriate manner, the claim is “procedurally defaulted” and barred  
27 from federal habeas review. *See, e.g., Ylst v. Nunnemaker*, 501 U.S. 797, 802-05  
28 (1991). There are two categories of procedural default, express and implied.



1 *Robinson v. Schriro*, 595 F.3d 1086, 1100 (9<sup>th</sup> Cir. 2010). Express procedural  
2 default operates to bar a federal habeas claim where a state court expressly applied  
3 a procedural bar to the prisoner's claim when the prisoner attempted to raise the  
4 claim in state court. *See, e.g., Ylst*, 501 U.S. at 802-05. Implied default (also  
5 referred to as technical exhaustion) occurs when the prisoner never presented his  
6 claim in state court and returning the prisoner to state court to present that claim  
7 would be futile under the state's procedural rules. *Teague v. Lane*, 489 U.S. 288,  
8 297-99 (1989).

9 As stated above, Petitioner pled guilty to three counts of a multi-count  
10 indictment. Because of his guilty plea, Petitioner's first PCR petition was an "of-  
11 right" proceeding and the functional equivalent of a direct appeal under Arizona  
12 law. *State v. Ward*, 118 P.3d 1122, 1125-26, ¶¶ 8-11 (Ariz. App. 2005); *Summers*  
13 *v. Schriro*, 481 F.3d 710, 713 (9<sup>th</sup> Cir. 2007). As detailed below, Petitioner failed to  
14 raise any of the grounds that he would have the Court consider in the instant  
15 Petition in his state PCR petition.

16 Petitioner asserted in his state PCR petition that: (1) he was deprived of his  
17 right to due process because his plea divested the court of "its duties to impose the  
18 minimum or maximum term," and (2) the trial court breached the plea agreement  
19 and erred by ignoring its constitutional duties to impose the proper sentence under  
20 [Arizona statute], by failing to mention any aggravating factors during sentencing.  
21 (Doc. 17 at Ex. Q.) In the instant Petitioner, Petitioner alleges ineffective  
22 assistance of trial counsel (Ground One), a Fifth Amendment right to counsel  
23 violation (Ground Two), and a Sixth Amendment right to counsel violation  
24 (Ground Three). (Doc. 1 at pp. 6-8.) Petitioner failed to raise these grounds in his  
25 state PCR petition. Accordingly, they are procedurally defaulted.

26 Petitioner's filings subsequent to his initial state PCR petition did not  
27 operate to exhaust any of the claims that he asks this Court to consider in his  
28 Petition. First, Petitioner's motion for reconsideration filed in the state trial court

1 was not a proper vehicle for bringing new claims to the state court's attention. *See*,  
2 *e.g.*, *State v. Bonnell*, 831 P.2d 835, 437 n.3 (Ariz. App. 1992) (it is inappropriate  
3 for a petitioner to raise new arguments in a motion for rehearing); *Eden v. Ryan*,  
4 2016 WL 1010698 at \*15 (D. Ariz. 2016) (claims raised in "various motions for  
5 reconsideration, motions to vacate, ungranted motions to amend, etc." do not  
6 constitute fair presentment of an issue). Moreover, the three claims Petitioner  
7 raised in his motion for reconsideration are different than the three grounds asserted  
8 in the instant Petition. *Compare* Doc. 17 at Ex. V at p. 8, *with* Doc. 1 at pp. 6-8.

9       Second, the claims Petitioner sought to present to the Arizona Court of  
10 Appeals in his petition for review also failed to constitute fair presentment as that  
11 court's procedural rules prevented it from considering the issues on the merits (as  
12 expressly mentioned by the appellate court). *See* Doc. 17 at Ex. CC at ¶ 5 (citing to  
13 *State v. Ramirez*, 616 P.3d 924, 928 (App. 1980) (holding that an appellate court  
14 will not consider on review any issue on which the trial court did not have an  
15 opportunity to rule)). *See also*, *Castille v. Peoples*, 489 U.S. 346, 351 (1989) (a  
16 claim that has been presented to the state courts for the first and only time in a  
17 procedural context in which its merit will not be considered is not fair presentation  
18 for purposes of the exhaustion requirement).

19       Third, Petitioner's special action to the Arizona Supreme Court that the state  
20 supreme court declined to consider did not exhaust his federal claims. Presenting a  
21 claim to the state supreme court in a discretionary petition does not exhaust a claim  
22 where the state supreme court declines to consider the claim without comment. *See*  
23 *Chambers v. McDaniel*, 549 F.3d 1191, 1169-97 (9<sup>th</sup> Cir. 2008) (presenting a claim  
24 to the Nevada Supreme Court in a discretionary petition for an "extraordinary writ"  
25 does not exhaust the claim if the petition is denied without comment); *Roettgen*, 33  
26 F.3d at 38 (submitting a new claim to the state's highest court in a procedural  
27 context in which its merits will not be considered absent special circumstances  
28 does not constitute fair presentation (citing *Castille*, 489 U.S. at 351)). Moreover,

1 Petitioner did not raise the claims that he raises now in the Petition with the state  
2 supreme court.

3 Fourth, Petitioner's motion to withdraw his plea did not operate to exhaust  
4 the claims he asserts in his Petition. While the claims Petitioner made in his second  
5 state PCR petition are similar to those he makes in the instant Petition, the state  
6 court expressly determined that Petitioner's claims in his second state PCR petition  
7 were precluded from its review by Rule 32.2(a) of the Arizona Rules of Criminal  
8 Procedure.

9 In sum, Petitioner failed to give the state courts a full opportunity to resolve  
10 any constitutional issues by fairly presenting his claims through one complete  
11 round of the state's established appellate review process. *O'Sullivan*, 526 U.S. at  
12 845. Petitioner cannot now return to state court in an effort to exhaust his claims as  
13 his claims would be barred under state procedural rules. *See, e.g.*, Ariz. R. Crim. P.  
14 32.2(a)(3); Ariz. R. Crim. P. 32.4(a); *State v. Rosario*, 987 P.2d 226, 228 (Ariz.  
15 App. 1999) (unexcused, untimely post-conviction petitions must be "summarily  
16 dismissed").

17 Accordingly, Petitioner's claims in his Petition are procedurally defaulted  
18 and precluded from federal habeas review. *Ylst, supra*.

### 19 **The Default Cannot be Excused**

20 A procedural default may be excused only if the petitioner demonstrates  
21 either (1) cause for the default and prejudice resulting from the default, or (2) a  
22 fundamental miscarriage of justice by showing that he is actually innocent.  
23 *Coleman*, 501 U.S. at 750; *Cooper v. Neven*, 641 F.3d 322, 327 (9<sup>th</sup> Cir. 2011). A  
24 petitioner must show both cause and prejudice before this Court may excuse a  
25 default. *Engle v. Isaac*, 456 U.S. 107, 134, n.43 (1982). To establish "cause," a  
26 petitioner must demonstrate that "some objective factor external to the defense  
27 impeded [petitioner]'s efforts to comply with the State' procedural rules."  
28 *Coleman*, 501 U.S. at 753. (Internal quotations omitted.) To show "prejudice," a

1 petitioner must demonstrate that the underlying alleged constitutional violation  
2 worked to the prisoner's "actual and substantial disadvantage, infecting his entire  
3 trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152,  
4 170 (1982).

5 Here, Petitioner has failed to *allege* that cause and prejudice for the default  
6 exist much less *establish* the existence of both cause and prejudice. There is no  
7 indication in the record that any external factor prevented Petitioner from  
8 exhausting his claims in state court. Nor is there any indication in the record that  
9 any alleged constitutional violation worked to Petitioner's actual and substantial  
10 disadvantage. In sum, there is nothing from which the Court can conclude that  
11 Petitioner's default may be excused under the cause-and-prejudice framework.

12 To demonstrate a "fundamental miscarriage of justice," a petitioner must  
13 establish that, in light of new evidence, "it is more likely than not that no  
14 reasonable juror would have found petitioner guilty beyond a reasonable doubt."  
15 *Schlup v. Delo*, 513 U.S. 298, 327 (1995). This standard "is demanding and  
16 permits review only in the extraordinary case." *House v. Bell*, 547 U.S. 518, 538  
17 (2006). (Internal quotations omitted.) Petitioner here does not claim innocence.

18 In sum, Petitioner's claims are procedurally defaulted and there is no basis  
19 from which the Court can conclude that the default may be excused.

#### 20 **Grounds Two, Three and a Portion of Ground One are Waived**

21 Even if all of Petitioner's claims were not procedurally defaulted (and as set  
22 forth above all of Petitioner's claims *are* procedurally defaulted), one of  
23 Petitioner's ineffective assistance of counsel claims in Ground One as well as  
24 Petitioner's claims in Grounds Two and Three were waived when Petitioner plead  
25 guilty.

26 "It is well settled that a voluntary and intelligent plea of guilty made by an  
27 accused person, who has been advised by competent counsel, may not be  
28 collaterally attacked." *United States v. Broce*, 488 U.S. 563, 574 (1989) (Internal

punctuation omitted.) Petitioner can challenge the voluntariness of the plea or counsel's advice regarding the plea. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973) ("When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel" was ineffective.); *Lambert v. Blodgett*, 393 F.3d 943, 979 (9<sup>th</sup> Cir. 2004) ("Because [petitioner] pleaded guilty upon the advice of counsel, he is limited to challenging his plea by demonstrating that the advice he received from counsel did not constitute effective representation.").

Here, as mentioned above, one of Petitioner's contentions in Ground One is that his trial counsel was ineffective for failing to challenge the admissibility of his confession. (Doc. 1 at p. 6.) In Ground Two Petitioner alleges his Fifth Amendment right to counsel was violated during an interrogation that took place after the formal adversarial process had begun. (*Id.* at p. 7.) In Ground Three, Petitioner claims his Sixth Amendment right to counsel during his interrogation was violated. (*Id.* at p. 8.) As demonstrated by the case law set out above, because Petitioner pleaded guilty these claims have been waived and are precluded from habeas review.

### **Recommendation**

Based on the foregoing, the Magistrate Judge recommends the District Court **DISMISS** the Petition for Writ of Habeas Corpus.

Pursuant to Federal Rule of Civil Procedure 72(b)(2), any party may serve and file written objections within fourteen days of being served with a copy of the Report and Recommendation. A party may respond to the other party's objections within fourteen days. No reply brief shall be filed on objections unless leave is granted by the district court. If objections are not timely filed, they may be deemed

1 waived. If objections are filed, the parties should use the following case number:  
2 **16-CV-00012-RM.**

3 Dated this 17th day of November, 2017.

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A handwritten signature in black ink, appearing to read "D. Thomas Ferraro", is written over a horizontal line.

Honorable D. Thomas Ferraro  
United States Magistrate Judge